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Date:	October 10, 2005	Phone Number	Fax Number
To:	Board of Patent Appeals and Interferences		(571) 273-8300
From:	Kevin J. Zilka		

Docket No.: NAI1P469/01.044.01 **App. No: 09/918,538**

Total Number of Pages Being Transmitted, Including Cover Sheet: 28

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Kevin J. Zilka

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Practitioner's Docket No. NAI1P469/01.044.01 *PATENT*

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Igor Muttik et al.

Application No.: 09/918,538 Group No.: 2167
Filed: 08/01/2001 Examiner: Dodds, H.
For: UPDATING COMPUTER FILES ON WIRELESS DATA PROCESSING DEVICES

Mail Stop Appeal Briefs – Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

TRANSMITTAL OF APPEAL BRIEF
(PATENT APPLICATION–37 C.F.R. § 41.37)

1. Transmitted herewith, in triplicate, is the APPEAL BRIEF in this application, with respect to the Notice of Appeal filed on July 8, 2005.

2. STATUS OF APPLICANT

This application is on behalf of other than a small entity.

10/12/2005 EFLORES 00000003 501351 09918538

02 FC:1251 120.00 DA

CERTIFICATION UNDER 37 C.F.R. §§ 1.8(a) and 1.10*

*(When using Express Mail, the Express Mail label number is **mandatory**; Express Mail certification is optional.)*

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37 C.F.R. § 1.8(a)

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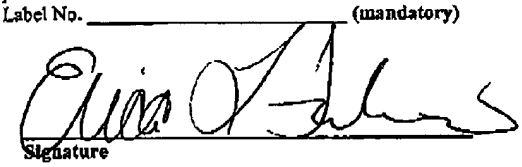
Date: 10/10/2005



Signature

Erica L. Farlow

(type or print name of person certifying)

** Only the date of filing (' 1.6) will be the date used in a patent term adjustment calculation, although the date on any certificate of mailing or transmission under ' 1.8 continues to be taken into account in determining timeliness. See ' 1.703(f). Consider "Express Mail Post Office to Addressee" (' 1.10) or facsimile transmission (' 1.6(d)) for the reply to be accorded the earliest possible filing date for patent term adjustment calculations.*

3. FEE FOR FILING APPEAL BRIEF

Pursuant to 37 C.F.R. § 41.20(b)(2), the fee for filing the Appeal Brief is:

other than a small entity	$500.00
Appeal Brief fee due	**$500.00**

4. EXTENSION OF TERM

The proceedings herein are for a patent application and the provisions of 37 C.F.R. § 1.136 apply.

Applicant petitions for an extension of time under 37 C.F.R. § 1.136 (fees: 37 C.F.R. § 1.17(a)(1)-(5)) for one month:

Fee:	$120.00

If an additional extension of time is required, please consider this a petition therefor.

Applicant believes that no additional extension of term is required. However, this conditional petition is being made to provide for the possibility that applicant has inadvertently overlooked the need for an additional petition and fee for extension of time.

5. TOTAL FEE DUE

The total fee due is:

Appeal brief fee	$500.00
Extension fee (if any)	$120.00
TOTAL FEE DUE	**$620.00**

6. FEE PAYMENT

Authorization is hereby made to charge the amount of $620.00 to Deposit Account No. 50-1351 (Order No. NAI1P469).

A duplicate of this transmittal is attached.

7. FEE DEFICIENCY

If any additional extension and/or fee is required, and if any additional fee for claims is required, charge Deposit Account No. 50-1351 (Order No. NAI1P469).

Signature of Practitioner
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Customer No.: 28875

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re the application of	)
	)
Muttik et al.	) Group Art Unit: 2167
	)
Application No. 09/918,538	) Ex: Dodds, Harold E.
	)
Filed: August 1, 2001	) Date: October 10, 2005
	)
For: UPDATING COMPUTER FILES ON WIRELESS DATA PROCESSING DEVICES	)
	)

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

ATTENTION: Board of Patent Appeals and Interferences

APPEAL BRIEF (37 C.F.R. § 41.37)

This brief is in furtherance of the Notice of Appeal, filed in this case on July 8, 2005.

The fees required under § 1.17, and any required petition for extension of time for filing this brief and fees therefor, are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

This brief contains these items under the following headings, and in the order set forth below (37 C.F.R. § 41.37(c)(i)):

I REAL PARTY IN INTEREST
II RELATED APPEALS AND INTERFERENCES
III STATUS OF CLAIMS
IV STATUS OF AMENDMENTS

V SUMMARY OF CLAIMED SUBJECT MATTER

VI GROUNDS OF REJECTION PRESENTED FOR REVIEW

VII ARGUMENTS

VIII APPENDIX OF CLAIMS INVOLVED IN THE APPEAL

IX APPENDIX LISTING ANY EVIDENCE RELIED ON BY THE APPELLANT IN THE APPEAL

The final page of this brief bears the practitioner's signature.

I REAL PARTY IN INTEREST (37 C.F.R. § 41.37(c)(1)(i))

The real party in interest in this appeal is McAfee, Inc.

II RELATED APPEALS AND INTERFERENCES (37 C.F.R. § 41.37(c) (1)(ii))

With respect to other prior or pending appeals, interferences, or related judicial proceedings that will directly affect, or be directly affected by, or have a bearing on the Board's decision in the pending appeal, there are no other such appeals, interferences, or related judicial proceedings.

Since no such proceedings exist, no Related Proceedings Appendix is appended hereto.

III STATUS OF CLAIMS (37 C.F.R. § 41.37(c) (1)(iii))

A. TOTAL NUMBER OF CLAIMS IN APPLICATION

Claims in the application are: 1-24

B. STATUS OF ALL THE CLAIMS IN APPLICATION

1. Claims withdrawn from consideration: None
2. Claims pending: 1-24
3. Claims allowed: None
4. Claims rejected: 1-24

C. CLAIMS ON APPEAL

The claims on appeal are: 1-24

See additional status information in the Appendix of Claims.

IV STATUS OF AMENDMENTS (37 C.F.R. § 41.37(c)(1)(iv))

As to the status of any amendment filed subsequent to final rejection, there are no such amendments after final.

V SUMMARY OF CLAIMED SUBJECT MATTER (37 C.F.R. § 41.37(c)(1)(v))

With respect to a summary of Claim 1 et al., as shown in Figure 2, a technique for controlling a target data processing device to update a current version of a file stored on a target data processing device is provided. In use, a wireless communication link with an in-range data processing device storing a more up-to-date version of the file is formed (e.g. item 12 of Figure 2). In addition, it is determined whether a portion of the more up-to-date version of the file is already stored within the target data processing device within a store of portions of one or more different more up-to-date versions of the file (e.g. items 13 and 14 of Figure 2). The more up-to-date version of the file is downloaded from the in-range data processing device following on from any portion of the more up-to-date version of the file already stored within the store (e.g. items 16-22 of Figure 2). When a full copy of the more up-to-date version of the file is stored on the target data processing device, the current version of the file is replaced with the more up-to-date version of the file to form a new current version of the file and to discard from the store any portions of less up-to-date versions of the file than the new current version of the file (e.g. item 28/30 of Figure 2). Note page 6, line 20-page 8, line 25, for example.

VI GROUNDS OF REJECTION PRESENTED FOR REVIEW (37 C.F.R. § 41.37(c)(1)(vi))

Following, under each issue listed, is a concise statement setting forth the corresponding ground of rejection.

Issue # 1: The Examiner has rejected Claims 1, 3-9, 11-17 and 19-24 under 35 U.S.C. 103(a) as being unpatentable over Van Huben, U.S. Patent No. 5,826,265, in view of Kathrow et al., U.S. Patent No. 6,393,438, in further view of Sisodia et al., U.S. Patent Application Publication No. 2003/0165128.

Issue # 2: The Examiner has rejected Claims 2, 10 and 18 under 35 U.S.C. 103(a) as being unpatentable over Van Huben, U.S. Patent No. 5,826,265, in view of Kathrow et al., U.S. Patent No. 6,393,438, in further view of Sisodia et al., U.S. Patent Application Publication No. 2003/0165128, and in further view of Goldick, U.S. Patent No. 6,598,060.

VII ARGUMENTS (37 C.F.R. § 41.37(c)(1)(vii))

Issue #1:

The Examiner has rejected Claims 1, 3-9, 11-17 and 19-24 under 35 U.S.C. 103(a) as being unpatentable over Van Huben, U.S. Patent No. 5,826,265, in view of Kathrow et al., U.S. Patent No. 6,393,438, in further view of Sisodia et al., U.S. Patent Application Publication No. 2003/0165128.

Group #1: Claims 1, 3- 9, 11-17 and 19-24

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art and not based on appellant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed.Cir.1991).

With respect to the first element of the prima facie case of obviousness and, in particular, the obviousness of combining the aforementioned references, the Examiner has not indicated how or why one would be "motivated to combine" the three references. There is no indication that one of ordinary skill in the art, confronted with the problem of partial downloads, would seek the advice of the Van Huben, Kathrow and Sisodia references to take advantage of partial downloads (downloads of "a portion of said more up-to-date version") and then build on those partial downloads until a complete more up-to-date version has been stored. None of the cited prior art references have anything to do with solving the problem of partial downloads, let alone providing any method of accommodating and resolving such partial downloads.

In fact, the Examiner's admissions are critical. He admits that the Van Huben reference "does not teach the segmenting of files into portions and the use of in-range processing devices." (Page 4, lines 3 4). This admission is appreciated and confirms that Van Huben has nothing to do with partial downloads and certainly would not recognize the problems associated with partial downloads. The Examiner admits that "Kathrow does not teach the use of in-range processing devices" (page 4, last line) and therefore Kathrow could not have any recognition of the problem of partial downloads from an in-range processing device. While Sisodia teaches wireless communications, there is no disclosure of any recognition of the problem of partial downloads or appellants' claimed solution to that problem.

Because none of the cited three references address the problem solved by appellants' invention, the Examiner has not met his burden of showing some reason or motivation for combining these references. Appellant emphasizes that the Court of Appeals for the Federal Circuit has stated in the case of *In re Rouffet*, 47 USPQ2d 1453, 1458 (Fed. Cir. 1998):

> "to prevent the use of hindsight based on the invention to defeat patentability of the invention, this court **requires the** examiner to show a motivation to combine the references that create the case of obviousness. In other words, **the Examiner must show reasons** that the skilled artisan, confronted with the same problems as the inventor and with no knowledge of the claimed invention, would select the elements from the cited prior art references for combination in the manner claimed." (emphasis added).

It is apparent from the latest Office Action that the Examiner has not identified any reasons or motivation for combining references, and indeed the prior art does not address the same problems as the current invention.

Also with respect to the first element of the prima facie case of obviousness, appellant notes that the Kathrow reference *teaches away* from appellant's claim language. Appellant respectfully points out that the Court of Appeals for the Federal Circuit has held in the case of *In re Fine*, 5 USPQ2d 1596, 1599 (Fed. Cir. 1988), that it is "error to find obviousness where references 'diverge from and teach away from the invention at hand.'"

Appellant's claim language is directed at retaining the more up-to-date version when "a full copy of said more up-to-date version" has been stored and to discard from store "any portions of less up-to-date versions of said file than said new current version of said file."

As previously noted in appellants' Amendment filed November 10, 2004, Kathrow appears to disclose just the opposite, since it has as an aim putting the Windows registry back to a previously more out-of-date form after which the registry had been changed, rather than seeking to update other versions to delay this state. Specifically, appellant notes the paragraph bridging columns 1 and 2 of the Kathrow reference which suggests that improper operation of a Windows operating system may be corrected by restoring "**values identical to those which it contained the last time the operating system or program operated properly**" (emphasis added). This restoration of an older but properly operating system is the object of the particular invention set out in the Kathrow reference, although Kathrow uses a somewhat complicated system to check each element of the Windows registry file and replace any improper portion with an older portion. Thus, clearly the Kathrow system *teaches away* from appellants' claimed invention.

More importantly, with respect to the third element of the prima facie case of obviousness, appellant respectfully asserts that the prior art references relied on by the Examiner fail to meet all of appellant's claim language.

With respect to appellant's claimed "determining if a portion of said more up-to-date version of said file is already stored within said target data processing device within a store of portions of one or more different more up-to-date versions of said file" (see the same or similar, but not identical language in each of the independent claims), appellant respectfully asserts that none of the cited prior art references teach this logic/step/element.

The Examiner admits on page 4 of the second non-final Action that "Van Huben does not teach the segmenting of files into portions and the use of in-range processing devices." This admission is appreciated. Clearly, if Van Huben does not segment files into portions, it does not look for portions of a more up-to-date version of the file in any memory device.

The Examiner admits that "Kathrow does not teach the use of in-range processing devices" (page 4 of the second non-final Official Action). This admission is appreciated. The Examiner does not indicate where or if Kathrow teaches the logic/step/element for making the required determination of whether the memory holds any portion of a more up-to-date version of the file.

Finally, while the Examiner cites Sisodia as teaching the use of a wireless communication link, there is no allegation that Sisodia teaches the logic/step/element for determining whether the memory holds any portion of a more up-to-date version of the file as required by appellants' claim.

In view of the above, since none of the cited references teach appellants' positively claimed logic/step/element for "determining if a portion of said more up-to-date version of the file is already stored within said target data processing device," even if the three references are combined, the three cited references, separately or together, cannot render obvious this claimed logic/step/element of appellant's independent claims.

With respect to appellant's claimed "downloading said more up-to-date version of said file from said in-range data processing device following on from any portion of said more up-to-date version of said file already stored within said store" (see the same or similar, but not identical language in each of the independent claims), appellant respectfully asserts that none of the cited prior art references teach this logic/step/element.

As noted above, none of the cited prior art references contain any determination as to portions of the up-to-date version of the file already stored within the target data processing device. As a consequence, they clearly cannot download a more up-to-date version "following on from any portion of said more up-to-date version" that is already stored."

With respect to appellant's claimed "replacing said current version of said file with said more up-to-date version of said file to form a new current version of said file and to discard from said store any portions of less up-to-date versions of said file than said new current version of said

file" (see the same or similar, but not identical language in each of the independent claims), appellant respectfully asserts that none of the cited prior art references teach this logic/step/element.

Appellant notes that the Examiner apparently believes that somewhere in the Van Huben reference there is some teaching of replacing "said current version of said file with said more up-to-date version of said file to form a new current version of said file" claimed by appellant. However, the Examiner has not identified any portion of the Van Huben reference which accomplishes such replacement.

The Examiner does allege that Kathrow teaches "version replacing logic operable to replace" at column 44, lines 10-15 and column 5, lines 50-53. However, it is assumed that the Examiner meant to refer to column 4, rather than column 44, as the Kathrow reference only has 20 columns in the entire document. However, looking at column 4, lines 10-15, this cited portion only indicates that there is an input that "administration 250 receives at input 252 a signal to fingerprint and store the information in the Windows registry file." The Examiner has provided no indication that this bears any relation to appellants' claimed replacing in which a "current version of a file" is replaced by a "more up-to-date version of said file." At column 5, lines 50-53, Kathrow discusses "hasher 222, characteristic identifier 224, and extractor 226" but does not indicate how or why he believes these have anything to do with appellants' claimed "replacing the current file." In addition, the Examiner makes no suggestion that Sisodia contains the missing logic/step/element.

Furthermore, because none of the references disclose storing portions of a file or determining what portions have been stored or downloading one or more portions of a more up-to-date version of such files, none of the references can be considered to discard "any portions of less up-to-date versions" of the file that have been stored.

Thus, appellant respectfully asserts that at least the first and third elements of the prima facie case of obviousness have not been met, as noted above.

Issue #2:

The Examiner has rejected Claims 2, 10 and 18 under 35 U.S.C. 103(a) as being unpatentable over Van Huben, U.S. Patent No. 5,826,265, in view of Kathrow et al., U.S. Patent No. 6,393,438, in further view of Sisodia et al., U.S. Patent Application Publication No. 2003/0165128, and in further view of Goldick, U.S. Patent No. 6,598,060.

Group #2: Claims 2, 10 and 18

Appellant respectfully asserts that such claim have not been met by the prior art relied on by the Examiner for the reasons argued with respect to Issue #1, Group #1.

In view of the remarks set forth hereinabove, all of the independent claims are deemed allowable, along with any claims depending therefrom.

VIII APPENDIX OF CLAIMS (37 C.F.R. § 41.37(c)(1)(viii))

The text of the claims involved in the appeal (along with associated status information) is set forth below:

1. (Previously Presented) A computer program product for controlling a target data processing device to update a current version of a file stored on a target data processing device, said computer program product comprising:
link forming logic operable to form a wireless communication link with an in-range data processing device storing a more up-to-date version of said file;
portion determining logic operable to determine if a portion of said more up-to-date version of said file is already stored within said target data processing device within a store of portions of one or more different more up-to-date versions of said file;
downloading logic operable to download said more up-to-date version of said file from said in-range data processing device following on from any portion of said more up-to-date version of said file already stored within said store; and
when a full copy of said more up-to-date version of said file is stored on said target data processing device, version replacing logic operable to replace said current version of said file with said more up-to-date version of said file to form a new current version of said file and to discard from said store any portions of less up-to-date versions of said file than said new current version of said file.

2. (Original) A computer program product as claimed in claim 1, wherein said file is one of:
(i) an anti-computer virus definition data file; and
(ii) a computer anti-virus scanning engine file.

3. (Original) A computer program product as claimed in claim 1, wherein if said in-range data processing device is storing a portion of said more up-to-date version of said file, then said downloading logic is operable to download said portion of more up-to-date version of said file to said target data processing device.

4. (Original) A computer program product as claimed in claim 1, wherein if said in-range data processing device is storing more than one more up-to-date version of said file, then said downloading logic is operable to download first that more up-to-date version of said file for which it will take least time to complete a full copy upon said target data processing device.

5. (Original) A computer program product as claimed on claim 1, comprising discard selection logic operable to select portions of a more up-to-date version of said file from said store are selected for discarding from said store based upon one or more of:
(i) age; and
(ii) amount of data needing to be downloaded to complete said version of said file.

6. (Original) A computer program product as claimed in claim 1, comprising authentication logic operable to authenticate a download from an in-range data processing device using a digital signature.

7. (Original) A computer program product as claimed in claim 1, wherein said in-range data processing device transmits to said target data processing device information regarding a currently progressing downloading of a version of said file to said in-range data processing device such that said target device may select said version of said file currently being downloaded to said in-range data processing device for downloading to said target data processing device.

8. (Original) A computer program product as claimed in claim 1, wherein said in-range data processing device also downloads a file from said target data processing device.

9. (Original) A method of updating a current version of a file stored on a target data processing device, said method comprising:
forming a wireless communication link with an in-range data processing device storing a more up-to-data version of said file;

determining if a portion of said more up-to-date version of said file is already stored within said target data processing device within a store of portions of one or more different more up-to-date versions of said file;

downloading said more up-to-date version of said file from said in-range data processing device following on from any portion of said more up-to-date version of said file already stored within said store; and

when a full copy of said more up-to-date version of said file is stored on said target data processing device, replacing said current version of said file with said more up-to-date version of said file to form a new current version of said file and discarding from said store any portions of less up-to-date versions of said file than said new current version of said file.

10. (Original) A method as claimed in claim 9, wherein said file is one of:

(i) an anti-computer virus definition data file; and

(ii) a computer anti-virus scanning engine file.

11. (Original) A method as claimed in claim 9, wherein if said in-range data processing device is storing a portion of said more up-to-date version of said file, then said portion of more up-to-date version of said file is downloaded to said target data processing device.

12. (Original) A method as claimed in claim 9, wherein if said in-range data processing device is storing more than one more up-to-date version of said file, then said target data processing device downloads first that more up-to-date version of said file for which it will take least time to complete a full copy upon said target data processing device.

13. (Original) A method as claimed on claim 9, wherein portions of a more up-to-date version of said file from said store are selected for discarding from said store based upon one or more of:

(i) age; and

(ii) amount of data needing to be downloaded to complete said version of said file.

14. (Original) A method as claimed in claim 9, wherein a download from an in-range data processing device is authenticated using a digital signature.

15. (Original) A method as claimed in claim 9, wherein said in-range data processing device transmits to said target data processing device information regarding a currently progressing downloading of a version of said file to said in-range data processing device such that said target device may select said version of said file currently being downloaded to said in-range data processing device for downloading to said target data processing device.

16. (Original) A method as claimed in claim 9, wherein said in-range data processing device also downloads a file from said target data processing device.

17. (Original) Apparatus for updating a current version of a file stored on a target data processing device, said apparatus comprising:
a link former operable to form a wireless communication link with an in-range data processing device storing a more up-to-data version of said file;
a portion determination unit operable to determine if a portion of said more up-to-date version of said file is already stored within said target data processing device within a store of portions of one or more different more up-to-date versions of said file;
a download unit operable to download said more up-to-date version of said file from said in-range data processing device following on from any portion of said more up-to-date version of said file already stored within said store; and
when a full copy of said more up-to-date version of said file is stored on said target data processing device, a version replacing unit is operable to replace said current version of said file with said more up-to-date version of said file to form a new current version of said file and to discard from said store any portions of less up-to-date versions of said file than said new current version of said file.

18. (Original) Apparatus as claimed in claim 17, wherein said file is one of:
(i) an anti-computer virus definition data file; and
(ii) a computer anti-virus scanning engine file.

19. (Original) Apparatus as claimed in claim 17, wherein if said in-range data processing device is storing a portion of said more up-to-date version of said file, then said downloading unit is operable to download said portion of more up-to-date version of said file to said target data processing device.

20. (Original) Apparatus as claimed in claim 17, wherein if said in-range data processing device is storing more than one more up-to-date version of said file, then said downloading unit is operable to download first that more up-to-date version of said file for which it will take least time to complete a full copy upon said target data processing device.

21. (Original) Apparatus as claimed on claim 17, comprising a discard selector operable to select portions of a more up-to-date version of said file from said store are selected for discarding from said store based upon one or more of:
(i) age; and
(ii) amount of data needing to be downloaded to complete said version of said file.

22. (Original) Apparatus as claimed in claim 17, comprising an authentication unit operable to authenticate a download from an in-range data processing device using a digital signature.

23. (Original) Apparatus as claimed in claim 17, wherein said in-range data processing device transmits to said target data processing device information regarding a currently progressing downloading of a version of said file to said in-range data processing device such that said target device may select said version of said file currently being downloaded to said in-range data processing device for downloading to said target data processing device.

24. (Original) Apparatus as claimed in claim 17, wherein said in-range data processing device also downloads a file from said target data processing device.

IX APPENDIX LISTING ANY EVIDENCE RELIED ON BY THE APPELLANT IN THE APPEAL (37 C.F.R. § 41.37(c)(1)(ix))

There is no such evidence.

In the event a telephone conversation would expedite the prosecution of this application, the Examiner may reach the undersigned at (408) 971-2573. For payment of any additional fees due in connection with the filing of this paper, the Commissioner is authorized to charge such fees to Deposit Account No. 50-1351 (Order No. NAI1P469/01.044.01).

Respectfully submitted,

By: _____ Date: 10/10/05

Kevin J. Zilka

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